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In the Supreme Court of the United States

October Term, 1957

EMANUEL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys,
Department of Justice.
Washington 25, D. C.

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CITATIONS

Cases:

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 53-66) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1957. The petition for a writ of certiorari was filed on August 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the immunity provision contained in Chapter 8 of Part II of the Interstate Commerce Act (49 U.S.C. 305(d)) applies to a witness before a grand jury investigating possible offenses arising under that chapter, as distinguished from a witness before the administrative agency.

2. Whether, assuming petitioner was protected by the immunity provision, the immunity was coextensive with his privilege against self-incrimination so as to afford him adequate protection.

3. Whether petitioner could summarily be found in contempt for refusal to answer questions put to him in open court after he had disobeyed the court's initial order to return to the grand jury and answer questions relevant to its inquiry and had been brought back and ordered to answer.

4. Whether petitioner's sentence of 15 months imprisonment for criminal contempt was an abuse of the court's discretion or a cruel and unusual punishment.

STATUTES AND RULE INVOLVED

Section 205(d) of the Interstate Commerce Act, as amended, 49 Stat. 550, 54 Stat. 922, 49 U.S.C. 305(d) provides:

> So far as may be necessary for the purposes of this chapter, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and re-

quire by subpena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under chapter 1 of this title; and any person subpenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

The Act of February 11, 1893, ch. 83, 27 Stat. 443, 49 U.S.C. 46 provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or

the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

18 U.S.C. 401(3) provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a), F. R. Crim. P., provides:

Criminal Contempt

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

On April 8, 1957, in the United States District Court for the Southern District of New York, Judge Richard H. Levet, acting under the authority of 18 U.S.C. 401(3), and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure (R. 3, 6), cited petitioner for contempt of court for refusing to answer certain questions in the court's presence. Petitioner was given a sentence of one year and three months imprisonment (R. 4, 6).

The contempt citation grew out of the following circumstances:

On April 5, 1957, petitioner appeared pursuant to subpoena to testify as a witness before a grand jury then engaged in investigating alleged violations of Part II of the Interstate Commerce Act, as amended (54 Stat. 919, 49 U.S.C. 301, *et seq.*) (R. 8, 10-11, 22-29). The subpoena directed him to testify as to (R. 23) "all and everything which you may know in regard to an alleged violation of Sections 309, 322, Title 49, United States Code." On the occasion of his appearance before the grand jury, petitioner was accompanied by his attorney who remained in the anteroom during the questioning (R. 23). After being sworn, petitioner was asked: "Mr. Brown, are you associated with Young Tempo, Incorporated?", and he replied, "I refuse to answer because by answering I may tend to incriminate myself" (R. 24).

Petitioner was then advised by the government attorney that the grand jury was conducting an inves-

tigation into possible violations of the Interstate Commerce Act; that under 49 U.S.C. 305(d) Congress had provided that any witness compelled to give testimony as to such matters would, by virtue of his testimony, be given immunity from federal prosecution as to any crime which might arise out of the subject matter of his testimony; that the "granting of immunity is as broad as the constitutional protections which [petitioner] would otherwise have under the Fifth Amendment"; and that as a result of such immunity petitioner had no privilege entitling him to refuse to answer (R. 24-25).[1] The grand jury foreman on request of the government attorney again asked petitioner the same question, whereupon petitioner requested and was given leave to consult his attorney concerning his rights (R. 25). On his return to the grand jury room he was again asked the question and again refused to answer on the ground of self-incrimination (R. 25).

Petitioner was again informed that, under the circumstances previously explained to him (which he said he understood), the privilege was not available to him, and warned that should he persist in his refusal he could be cited in contempt. At this juncture he was again given leave to consult with his attorney, and on his return, after being asked the same question a second time by the foreman, he

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[1] On March 25, 1957, eleven days prior to this grand jury appearance, petitioner's attorney, in a conference with government attorneys, was specifically advised of the government's intention to compel petitioner's testimony pursuant to this statutory grant of immunity (R. 9-10, 11-12).

again refused to answer it on the same ground (R. 26-27). He similarly refused to answer on the ground of self-incrimination five other questions (R. 27-29).

The transcript of the grand jury proceedings involving petitioner was read to the court (R. 22-29). In support of his argument that the immunity afforded was not coextensive with the privilege, petitioner's counsel told the court that petitioner had been questioned before two other grand juries, one relating to the Victor Riesel obstruction of justice case, and the other relating to alleged racketeering in the garment trucking industry (R. 32), and that he had claimed the privilege against self-incrimination in those inquiries. He argued that, should he testify in the instant grand jury proceedings, the immunity afforded him would not be sufficient to protect him against the use of his testimony in prosecutions arising out of those other inquiries, or in other collateral proceedings, such as possible violations of the Internal Revenue laws (R. 36-37).

On April 8, 1957, the court ruled that the immunity provisions of the Interstate Commerce Act afforded petitioner complete immunity "from prosecution for all matters on which he is questioned before this grand jury" (R. 46). The court directed him to answer the question before the grand jury (R. 44-45). Later in the afternoon the grand jury returned to the courtroom and through government counsel again requested the assistance of the court with reference to petitioner's continued refusal to answer the questions (R. 47).

On the application of government counsel, the court called petitioner to the stand to ask him the questions which he had refused to answer before the grand jury (R. 51). Petitioner's counsel objected to this procedure on the ground that "the witness is now being asked in a criminal cause to be a witness" (R. 51). The court, noting that the immunity statute protected petitioner, overruled the exception and called petitioner to the stand (R. 51-52). He was asked by the court, in the presence of the grand jury, the questions he had previously refused to answer before the grand jury. In each instance he again refused to answer on the ground that the question tended to incriminate him (R. 53-55). The court asked each question again and he again refused to answer (R. 55-57). Petitioner further stated that if he were returned to the grand jury room he would continue to refuse to answer the questions. (R. 57)

After hearing argument on the legal issues involved (R. 58-60), the court held petitioner in contempt (R. 60). On appeal the judgment was affirmed.

ARGUMENT

1. Petitioner seeks to justify his refusal to answer questions on the ground that, as a witness before a grand jury, he was not within the coverage of the immunity provisions in 49 U.S.C. 305(d) and 46. He argues that the immunity applies only tc a witness before the Interstate Commerce Commission itself. The language and history of the statutes refute this contention.

Section 305(d) provides in pertinent part (for full text see pp. 2-3 *supra*):

> * * * any person subpoenaed or testifying in connection with any matter under investigation under this chapter shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under chapter 1 of this title, unless otherwise provided in this chapter.

The relevant portions of Section 46 provide:

> No person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of chapter 1 of this title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify * * * in any such case or proceeding: * * *

Section 46, which grants immunity in any cause "criminal or otherwise," admittedly applies to grand jury investigations. And Section 305(d), in referring to the "rights, privileges and immunities" as well as the "duties, liabilities, and penalties" of a witness "as though such matter arose under chapter 1," incorporates the same immunity. As the Court of Appeals observed (Pet. App. 59), "the natural meaning of the reference in § 305(d) to § 46 is that whatever is within the scope of the latter is to be incorporated into the former" and therefore "the

immunity applies to grand jury investigations under Chapter 8, the Motor Carrier Act, just as it does to such investigations under Chapter I."

Petitioner argues that since the first clause of Section 305(d), *supra* pp. 2-3, grants investigatory power only to the Commission for "any matter under investigation," the reference in the immunity clause of § 305(d) to "any matter under investigation under this chapter" should be read *in pari materia* with the empowering clause to mean "under investigation under this chapter by the Commission" (Pet. 17). No justification exists for such a limiting construction. The phrase, "any matter under investigation under this chapter," in its natural meaning applies to investigation of possible violations of the chapter punishable under 49 U.S.C. 322. The fact that the first clause of Section 305(d) refers only to the Commission, and does not grant to grand juries investigatory power which they already possess, does not suggest that the immunity provision in the second clause is limited to Commission investigations. On the contrary the legislative history shows that Congress in fact sharply distinguished between the two subdivisions of the subsection, and that the differences in the language of the subdivisions reflect precisely what was intended. The Motor Carrier Act was introduced in Congress in 1935 as S. 1629 (79th Cong., 1st Sess.). On the floor of the House of Representatives, the bill having been favorably reported from committee, two amendments were offered to § 305 (d).[2] See 79 Cong. Rec. 12232. The last phrase of

[2] Then § 205(e) of the bill.

the first subdivision of § 305(d), in its original version, read:

> "as though such matter arose under Part I,"

This was amended to its present form:

> "as the Commission has in a matter arising under Part I [3]"

However, the parallel language of the second subdivision of § 305(d), which originally read:

> "as are provided in Part I,"

was made to read, as it still does:

> "as though such matter arose under Part I."

The changes were accepted by both the House and Senate. 79 Cong. Rec. 12232, 12460. By these amendments, Congress clarified its intent to have the powers granted in the first subdivision of § 305(d) apply to hearings before the Commission, but at the same time reiterated the broad, unqualified scope of the incorporation of § 46 by the second subdivision of § 305(d).

As this Court observed in *Brown* v. *Walker*, 161 U. S. 591, 594 (recently reaffirmed in *Ullmann* v. *United States*, 350 U.S. 422, 436-439), Section 46 (enacted in 1893, 27 Stat. 443, when only railroads were covered by the Act) was promulgated for the express purpose of giving complete immunity to witnesses in all proceedings under the Interstate Commerce Act, and to correct the infirmity of the pre-

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[3] "Part I," as codified in the United States Code, becomes "Chapter I of this title."

vious immunity statute which gave only limited immunity (*Counselman* v. *Hitchcock*, 142 U.S. 547). It must be assumed that this judicial gloss on Section 46 was carried forward in Section 305(d) when the former was incorporated by reference in the latter. The reenactment of an immunity statute and *a fortiori* its incorporation by reference in another statute "creates a presumption of legislative adoption of previous judicial construction" given that statute. *Shapiro* v. *United States*, 335 U. S. 1, 20. Section 305(d) is therefore properly read to provide the same immunity to witnesses in all investigations under Chapter 8 of the Interstate Commerce Act as Section 46 extends in investigations under Chapter I. This, of course, includes witnesses before grand juries.

2. Petitioner also argues that, even if Section 305 (d) incorporates the immunity granted by Section 46, it grants inadequate protection. He contends that the phrase "in connection with any matter under investigation under this chapter" limits the immunity to offenses arising under the chapter and does not give protection as to collateral crimes. The qualifying phrase is, however, descriptive of the class of witnesses to whom the immunity will attach (*i. e.*, "any person subpoenaed or testifying in connection with any matter under investigation under this chapter"). It does not limit the extent of the immunity granted to such a witness. The immunity is otherwise defined in Section 46 in language of broad import to include "any transaction, matter or thing, concerning which he may testify, or produce evi-

dence, documentary or otherwise." This immunity, which extends to any "transaction, matter or thing" concerning which the witness may testify, is applicable "whenever and in whatever court such prosecution may be had." *Brown* v. *Walker*, 161 U. S. 591, 608. It protects the witness from future prosecution based on the testimony given and sources of information obtained from the compelled testimony. *Ullmann* v. *United States*, 350 U.S. 422, 436-437. Petitioner was fully protected by the immunity. He was therefore not entitled to refuse to answer the questions under the claim of privilege.

3. Petitioner argues (Pet. 23-33) that he could not be summarily punished for contempt under Rule 42 (a) since the contempt, if any, was of the grand jury. He argues that the court failed to accord him due process when it put the questions to him and treated the refusal to answer as a contempt in the presence of the court.

The procedure followed has been used many times, where, as here, the only issue is a legal one—whether the witness could properly be required to answer. It is the method by which the court's direction to answer is incorporated in a final judgment which may be reversed on appeal. *Rogers* v. *United States*, 340 U.S. 367;[4] *Hale* v. *Henkel*, 201 U.S. 43; *United States*

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[4] In the *Rogers* case, petitioner refused to answer the questions of a grand jury and was brought before the district court which committed her to the custody of the marshal pending her hearing the next day relative to her reasons for refusing to answer. The next day on her representation that she would purge herself, she was allowed to return to the grand jury room where she again refused to

v. *Curcio*, 234 F. 2d 470, 483 (C.A. 2), reversed on other grounds, 354 U.S. 118; *United States* v. *Weinberg*, 65 F. 2d 394, 395 (C.A. 2), certiorari denied, 290 U.S. 675. The power to compel the attendance of witnesses before grand juries has always been vested in the court of which the grand jury is an arm. This power carries with it the correlative power to ascertain whether its process is being complied with and to issue further orders to compel obedience. To that end the witness may, on his first refusal before the grand jury, be brought before the court and may be made to return to the grand jury to answer the questions. On his further refusal, the court may treat the second refusal before the grand jury as a disobedience to the court's order outside of the presence of the judge, in which event, the contempt of the court's authority must be prosecuted on notice under Rule 42 (b), F. R. Crim. P., since the acts constituting the contempt have not been seen or heard by him in the first instance. But where the judge in the exercise of his ancillary power in aid of the grand jury elects to make a further order to

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answer the questions. The court then asked her if she still persisted in her refusal, and when she said she did, held her in criminal contempt under the summary disposition procedures. Although the issue of the validity of these procedures was raised before this Court (see Pet. Br. Nos. 20, 21, 22, O.T. 1950, pp. 54-58; Br. for United States, *Ibid.*, pp. 51-53), this Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling her contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue (Pet. for Rehearing, No. 20, O.T. 1950, pp. 6-10) was denied (341 U.S. 912).

the witness in open court and before the grand jury to answer the questions, and the witness refuses, and states that he will persist in his refusal (see R. 57), he may treat this disobedience to this final order in the presence of the court as the basis of the contempt under the summary procedures provided for by Rule 42 (a), F. R. Crim. P. See: *Cooke* v. *United States*, 267 U.S. 517, 534-537. Petitioner, at every stage, was given full opportunity to present any argument he could muster. He therefore had full opportunity to defend himself.[5]

Petitioner's further contention (Pet. 29-31) that he had an absolute right as a defendant in a contempt proceeding against taking the stand, when, after disobeying the court's order to testify before the grand jury on the second occasion he was brought again

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[5] The cases which petitioner contends are in conflict with the decision below (*Carlson* v. *United States*, 209 F. 2d 209 (C.A. 1); *Wong Gim Ying* v. *United States*, 231 F. 2d 776 (C.A. D.C.)) are both clearly distinguishable. The contempt citation in the *Carlson* case was based on a refusal to answer questions before a grand jury without an intervening court hearing to determine the witness's legal obligation to answer, followed by a disobedience to the court's order. In *Wong Gim Ying*, after refusing to answer the grand jury questions, the court made no order directing the appellant to return to the grand jury room to answer the questions, as in the case at bar, but after considering and overruling her claim of privilege, adjudged her in contempt forthwith under summary procedures. Neither case suggests that, after an initial disobedience to the court's order to return to the grand jury room and answer the questions, the court cannot then order the witness to answer the questions in open court in the presence of the grand jury and summarily hold him in contempt on his refusal to obey such final order.

into court, similarly misconceives the basis of the court's contempt citation. While his disobedience of the court's order to return and testify might have been made the basis of a contempt citation, the court chose not to regard the contempt as complete. It gave him the opportunity to purge himself and answer the questions in open court. He was not therefore in the status of a defendant until after he had again refused to give the answers demanded.[6]

4. Finally, petitioner contends that his sentence of 15 months imprisonment violated the guarantee against cruel and unusual punishment, and constituted an abuse of the court's discretion (Pet. 31-33). As the Court of Appeals observed (Pet. App. 65-66), it is by no means extraordinary in its severity as

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[6] Petitioner includes as one of the questions presented for review (Pet. 3) "[w]hether the secrecy of the proceedings violated the requirement that a contempt judgment be public", although he does not pursue this issue in his argument. The record indicates that on the morning of April 5, 1957, prior to hearing the legal argument relative to petitioner's claim of privilege, Judge Levet ordered the courtroom cleared of all but the interested parties. Petitioner made no objection (R. 7). During this morning "colloquy," no testimony was taken on the application to the court to compel petitioner to answer the questions and there is no showing that a similar procedure was followed in the afternoon or in any of the court appearances thereafter. In any event these April 5th proceedings which culminated only in the court's order directing petitioner to return to the grand jury room could in no sense be considered a contempt proceeding since the contempt did not arise until April 8, 1957. The conclusions of the court below that petitioner had no standing to raise this point for the first time on appeal, and that in any event it was without merit, are therefore amply justified (Pet. App. 64-65).

compared to other contempt cases. *E.g.*, *Hill* v. *United States ex rel. Weiner*, 300 U.S. 105, 106; *Lopiparo* v. *United States*, 216 F. 2d 87, 92 (C.A. 8), certiorari denied, 348 U.S. 916; *Warring* v. *Huff*, 122 F. 2d 641 (C.A. D.C.), certiorari denied, 314 U.S. 678; *Conley* v. *United States*, 59 F. 2d 929 (C.A. 8). The court evidently regarded petitioner's contentions as motivated by a desire to obstruct the investigation (see statement by government counsel, R. 60-62). The sentence was neither an abuse of judicial discretion nor cruel or unusual. Cf. *United States ex rel. Brown* v. *Lederer*, 140 F. 2d 136, 138-139 (C.A. 7), certiorari denied, 322 U.S. 734; *Creekmore* v. *United States*, 237 Fed. 743, 754-755 (C.A. 8).

Petitioner asserts (Pet. 32) that "two of the questions involved" in this case are presently before the Court *sub judice* in *United States* v. *Green*, 241 F. 2d 631 (C.A. 2), certiorari granted, 353 U.S. 972, No. 100, this Term, a case involving, *inter alia*, the legality of a sentence of three years imposed on those petitioners, who, having been convicted under the Smith Act, failed to appear for surrender to the United States Marshal in accordance with an order of a federal district court. While it is apparent that the instant case involving the imposition of a 15-month sentence is factually distinguishable, it is true that one of Green's arguments raised before this Court (see Petition, *United States* v. *Green*, No. 100, this Term) is that 18 U.S.C. 401 incorporates by implication a sentence limitation of one year's imprisonment.

Nevertheless, we respectfully submit that there is no necessity to withhold action on the instant petition pending a decision in *Green* since the question, however resolved, does not go to the validity of petitioner's conviction. Petitioner was granted bail pending appeal and the Court of Appeals has stayed its mandate pending disposition in this Court. (Pet. 1) If the instant petition is denied, petitioner would have ample opportunity to make application to the district court under Rule 35, F. R. Crim. P., for correction of his sentence "at any time" should this Court's opinion in the *Green* case determine that any contempt sentence in excess of one year is illegal.[7]

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[7] On the assumption that the 15-month sentence was intended by the court to be coercive rather than punitive, petioner argues that it was incumbent on the court to provide a purge clause in the sentence. The sentence indicates however that the court considered petitioner's refusal to be obstructive and that the court intended to punish petitioner for his flouting of the authority of the court. The contempt was criminal. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 296-300; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-445; *Parker* v. *United States*, 153 F. 2d 66, 70-71 (C.A. 1). While the court might have included a purge provision in the sentence in addition to the criminal punishment (cf. *Grant* v. *United States*, 227 U.S. 74, 78; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916; *Ibid.*, 222 F. 2d 897 (C.A. 8); *United States* v. *Curcio*, *supra*, (234 F. 2d 470 (C.A. 2)), its failure to do so did not invalidate the sentence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

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